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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL LOUIS JARAMILLO, Defendant and Appellant.	B210249 (Los Angeles County Super. Ct. No. VA087356)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Modified and affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Daniel C. Chang and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Manuel Louis Jaramillo appeals from the judgment entered after a jury convicted him of one count of second degree murder (Pen. Code, § 187, subd. (a))[1] and four counts of attempted murder (§§ 664/187, subd. (a)), with findings that he personally used and intentionally discharged a firearm causing great bodily injury and that he committed the offenses for the benefit of a criminal street gang (§§ 12022.53, subds. (b), (c), & (d); 186.22. subd. (b)(1) & (4)). He was sentenced to 40 years to life. We modify the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 26, 2004, at approximately 3:30 p.m., Gustavo Torrelba was watching television at his place of employment, the Body Illusions tattoo parlor in Whittier. The owner of the parlor, Mike Esparza, was giving a tattoo to a customer named Jonathan Jordan. Also present were three other employees, Andrew Bobadilla, Brian Prospect, and "Spider." Torrelba did not know Spider's real name and knew Esparza only as "Magic." Spider and Prospect were in the back of the shop. Three men, armed with guns and wearing full motorcycle gear, entered the parlor. One of the men was wearing a helmet. Torrelba heard two shots, and one bullet grazed his chin and neck. Jordan was facing the wall, and did not see anyone enter the parlor. When he heard gunshots, he ducked and called 911 from his cell phone. Spider dove behind a divider wall. Torrelba, Spider, and Bobadilla ran out the back door. Bobadilla came back in the parlor and saw that Esparza was unconscious with a wound to his forehead.

Los Angeles County Sheriff Detective Shannon Laren responded to the scene and found five .22 caliber expended cartridge casings. The only blood in the shop was behind the chair where Esparza was sitting. Esparza died later that day as a result of a gunshot wound to the head.

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[1] All further statutory references are to the Penal Code.

In February 2005, appellant's father told a sheriff's deputy that appellant had information about the tattoo parlor shooting. That same day, Sergeant Shaun McCarthy interviewed appellant, who admitted that he had participated in the tattoo parlor shooting along with Ernie Howard and Bennie Acosta,[2] two gang members. Appellant said that Acosta gave him a helmet and a backpack with three guns and a motorcycle, and told him to go to the tattoo parlor to shoot someone. They selected the tattoo parlor because it was a location the Mongols gang was known to frequent. Appellant said that Acosta and Howard threatened to "smoke" him if he refused. Acosta fired the shots because appellant was frightened. Acosta then gave appellant the backpack containing the guns and left on the motorcycle.

Appellant was charged with the murder of Esparza and four counts of attempted murder.

At trial, Arthur Desautels, the owner of a nearby video rental store, said that on the day of the shooting three men, one in full motorcycle gear, walked towards the tattoo parlor. Less than a minute later, Desautels heard noises like firecrackers or shots and he went into the parlor. He saw the owner on the ground bleeding from the head.

Arthur Munoz, who worked at a taco stand in the area, testified that he saw someone get off a motorcycle with a helmet on and the face guard down even though it was a hot day. Two other men joined him, and they disappeared from sight for a few minutes. Then he saw the motorcycle rider get back on the motorcycle and leave. The other two men ran out. He saw Desautels, who told him to call 911 because the owner of the store had been shot.

Daniel Evanilla, a peace officer for the California Department of Corrections and Rehabilitation, told the jury that he monitored the activities of gang members in prison and on the street. He was an expert on the inner workings of the Mexican Mafia gang. He testified that at the time of the shooting there was an ongoing war between the Mexican Mafia and the Mongols motorcycle gang, and there was an order from the

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[2] Sometimes referred to as Demon Acosta.

Mexican Mafia to start "taking out" Mongols members. On the day of the shooting, there were Mongols working at the tattoo parlor. In Evanilla's opinion, the shooting was committed at the direction of the Mexican Mafia to send a message to the Mongols.

Los Angeles County Sheriff's Detective Kevin Lloyd also testified as a gang expert. He had known appellant since 1999 and recognized the tattoos on his arms as gang tattoos. Appellant was an active gang member of Rivera 13 and his moniker was Mono. Appellant was a fast rising member of the gang. Detective Lloyd knew that one of appellant's hobbies was racing Japanese motorcycles. According to the detective, the Rivera gang was loyal to the Mexican Mafia and gang members, in general, would have volunteered to kill someone on behalf of the Mexican Mafia. When presented with a hypothetical example about a conflict between the Mexican Mafia and the Mongols, Detective Lloyd opined that if a gunman fired shots in broad daylight in a tattoo parlor where three Mongols worked, it would increase the shooter's gang status. He explained that there are thousands of gang members in the Whittier area, and that the Mexican Mafia would not have picked someone to commit the shooting unless the person was willing to follow through.

Bobadilla testified that he was a member of the Mongols motorcycle gang. The emblem of the gang was Genghis Khan and Bobadilla had a Genghis Khan tattoo. On the tattoo parlor counter was a painting of a Genghis Khan character. At some time in the past, Prospect was a Mongol; however, he was not a member at the time of the incident. Esparza, Torrelba, Spider, and Jordan were not members.

In his defense, appellant called his sister, Melanie Jaramillo, his mother, Monica Jaramillo, and a friend, Edward Osollo, who all testified about an incident in April 2004 during which appellant was severely beaten in the head. According to Melanie and Monica, Ernie Howard and Bennie Acosta, the men appellant told police were his accomplices, were involved in beating appellant. Monica claimed Howard and Acosta assaulted appellant because he failed to carry out a "horrible" mission.

The expended bullet casings were determined to have been fired from the same weapon. The weapon used in the shooting was never recovered.

DISCUSSION

I. Sufficiency of the Evidence

The information named Gregory Reddeman as the victim of attempted murder in count 4. After the prosecution rested, appellant moved to dismiss all of the counts pursuant to section 1118.1. The court asked the prosecutor to address count 4 because its notes did not reflect any evidence that Spider and Reddeman were the same person. After the prosecutor claimed that there was such evidence in the record, the trial court denied the motion. Appellant contends this was error.

Torrelba and Bobadillo identified an individual in a photograph (People's exhibit number four) as the person they knew as "Spider." Both testified that there were five men in the parlor at the time of shooting. Four of the men were the named victims in the other counts, and the fifth was Spider. There was no specific testimony that Spider's real name was Reddeman. Reddeman had been subpoenaed by the prosecution as a witness and initially failed to appear. When he was finally located, the prosecution elected not to call him, believing that his testimony was cumulative.

Appellant contends the conviction on court 4 must be reversed because there was no evidence the victim named in the information, Gregory Reddeman, was present at the time of the shooting. Thus, he asserts, there was no basis for the jury to find that he attempted to kill Reddeman. We disagree.

The purpose of the information is to give the accused notice of the offense of which he or she is accused. (§ 952; *People v. Ramirez* (2003) 109 Cal.App.4th 992, 999-1000.) Here, although he does not use the term, appellant is alleging there is a variance, "a difference between the allegations of the accusatory pleading and the proof." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 191, p. 398.) However, "[a]n immaterial variance between pleading and proof does not require a reversal." (*People v. Koch* (1970) 4 Cal.App.3d 270, 276.) "'Under the generally accepted rule in criminal law a variance is not regarded as material unless it is

of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense.' [Citation.]" (*In re Michael D.* (2002) 100 Cal.App.4th 115, 128.) At no time, either in the trial court or on appeal, has appellant claimed that he was unaware of the nature of the charges against him or that his defense was hampered. As such, we conclude the variance between the information and the evidence presented at trial does not warrant a reversal. (*Id*. at pp. 127-128 [variance immaterial where evidence showed minor drew a weapon against person not named as the victim in the petition]; *People v. Powell* (1974) 40 Cal.App.3d 107, 123-124 [variance immaterial where information charged murder occurred in Los Angeles County and evidence established fatal shot was fired in Kern County].)

Appellant also contends that the evidence is insufficient to sustain his conviction for attempted murder against Reddeman. He asserts this is so because no one testified that Reddeman was present in the parlor, was in appellant's view, or was in appellant's line of fire at the time of the shooting. We disagree.

"On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) "'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."' [Citation.]" (*Ibid.*)

The testimony was that the shooter stood in front of a confined area and fired multiple rounds in rapid succession at close range. As to Reddeman's presence in the parlor, Torrelba testified that Spider was "right there" when the shooting started. He said Spider ducked down behind the divider wall after the first shots were fired. Torrelba said he grabbed Spider and the two ran out of the parlor.

We have seen People's exhibit number 7, a photograph of the tattoo parlor, and exhibit number 8, a diagram of the parlor. On the diagram, some of the victims designated where they were standing when the gunman entered. We also note that some of the dimensions of the parlor are set forth on the diagram. The diagram shows that the victims were confined in an area roughly 12 feet by 10 feet when the shooting occurred. The portion of the parlor where the victims were standing was open, with no barriers to block one's view of the interior from the front door. Substantial evidence supports the conclusion that Reddeman was in appellant's view and line of fire when appellant pulled the trigger.

Moreover, given the motive for the shooting, the layout of the location of the shooting, the rapid fire, and the number of shots fired, the jury reasonably found that appellant had the specific intent to kill everyone in the parlor. As the Supreme Court noted in *People v. Stone* (2009) 46 Cal.4th 131, 140, "[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person." The court went on to explain that a bomber who places a bomb on an airplane with the intent to kill a primary target could also be convicted of the attempted murder of the other passengers on board. As relevant here, it also stated that "a terrorist who simply wants to kill as many people as possible, and does not know or care who the victims will be, can be just as guilty of attempted murder." (*Ibid*.) The theory applies here.

The evidence established that appellant and his companions went to the parlor to shoot at everyone who was there because the place was a known hangout for Mongols gang members, a gang at odds with the Mexican Mafia. Appellant fired rapidly and indiscriminately at close range into an enclosed area, demonstrating an intent to kill. Substantial evidence supports the verdict as to count 4.

II. Ineffective Assistance of Counsel

The jury was instructed with CALJIC No. 8.66.1, that, "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a

particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' zone of risk is an issue to be decided by you."

The prosecutor stated in closing argument: "Another way to consider attempted murder is what they call 'kill zone,' 'kill zone theory.' And the way to explain it [is] this; assume that you initially intend to kill just one person, Mr. A. That's your primary target, Mr. A. However, assume that Mr. B is standing right next to Mr. A. I take a gun and I start spraying rounds all around Mr. A, trying to kill Mr. A. The law says that from these circumstances you can conclude that, based on my conduct, I also intend to kill Mr. B, because Mr. B is close to Mr. A. Mr. B was within the kill zone. So when you take a gun and you start spraying rounds into a little reception area of a shop, or into a tattoo parlor stall enclosed on three sides by little walls, that's a kill zone. That's a kill zone. When you spray round[s] in such [a] proximity you intend to kill everyone in that zone."

Appellant contends that the instruction and the prosecutor's argument misstated the law. He contends that his counsel's failure to object to either constituted ineffective assistance of counsel. He argues that the instruction failed to inform the jurors about the scope of a "kill zone" and did not inform them that a victim fell within the zone only if he was visible to the shooter and the shooter knew the victim was in the direct line of fire. He also argues that the prosecutor incorrectly informed the jury that because the victims of the shooting were within the kill zone, it could infer that appellant had the specific intent to kill them.

Turning first to the claim of instructional error, we find there was sufficient evidence to support the "kill zone" instruction. As we have discussed above, the manner in which the armed assault was carried out, the motive that spurred the intent to kill indiscriminately, and the narrow confines of the kill zone justify the conclusion that appellant intended to kill as many of the parlor's occupants as he could. As such, there

was ample evidence that appellant intended to kill multiple victims. "[T]he very act of firing a weapon '"in a manner that could have inflicted a mortal wound had the bullet been on target"' is sufficient to support an inference of intent to kill." (*People v. Smith* (2005) 37 Cal.4th 733, 742, quoting *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) The instruction was appropriate, and appellant's trial counsel had no cause to object.

With respect to his assertion that the prosecutor engaged in improper argument, appellant relies heavily on *People v. Anzalone* (2006) 141 Cal.App.4th 380 (*Anzalone*), where an ineffective assistance of counsel claim was upheld due to the defense attorney's failure to object to the prosecutor's closing argument. *Anzalone* is distinguishable from this case. In *Anzalone*, the defendant was first seen attempting to take a car and was thwarted by four men. Shortly thereafter, the defendant returned in a car and fired two shots at the four men. (*Id.* at pp. 384-385.) The defendant was charged and convicted of four counts of attempted murder. The court did not instruct the jury with CALJIC No. 8.66.1, nor did it instruct the jury on transferred intent. It instructed that to find the defendant guilty of deliberate and premeditated attempted murder, it was necessary to find he intended to kill. (*Id.* at p. 396.) The prosecutor stated in argument, "'How do we get the four counts on the two gunshots? Here is the way the law says it is. Something called the zone of danger. Anytime someone is within the zone of danger, whether it be one, two, three or twenty people, somebody indiscriminately shoots towards a crowd of people, everything in that zone of danger qualifies.'" (*Id.* at p. 391.) The appellate court concluded that the prosecutor's argument was "erroneous and misleading" because he did not define the parameters of the kill zone to the jury. (*Id*. at pp. 392-393.)

Unlike the prosecutor in *Anzalone*, the prosecutor in the present case did not claim that an attempted murder is committed against all persons in a group simply because shots are fired indiscriminately at them. He specifically defined the kill zone as the "little reception area" of the "tattoo parlor stall enclosed on three sides by little walls." He explained, "When you spray round[s] in such [a] proximity you intend to kill everyone in that zone." Thus, the prosecutor correctly informed the jury that "the nature of

[appellant's] attack [was] such that it [was] reasonable to infer that [he] intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person." (*Anzalone*, *supra*, 141 Cal.App.4th at p. 393.)

Even if we were to conclude that the prosecutor misstated the law, appellant cannot establish that he was prejudiced by his attorney's failure to object. The record makes it clear that the jury either did not remember or understand the gist of the prosecutor's argument on the subject.

During deliberations, the jury submitted the following question to the court: "Can we have the closing statement of the prosecutor read back to us so that we can have an easier understanding of what the law says?" The court then instructed the jury, "Argument of counsel is not evidence. The law is contained in the jury instructions which you have." We find no merit in the ineffective assistance claim. (*People v. Pinholster* (1992) 1 Cal.4th 865, 918-919; *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396.)

III. Custody Credits

Appellant contends that he was awarded 1,249 days in presentence custody credits but was entitled to 1,272 days based on the date of his arrest (Feb. 7, 2005) and sentencing (Aug. 1, 2008) as reflected in the record. The People concede that he is correct. Accordingly, we modify the abstract of judgment.

DISPOSITION

We direct the clerk of the superior court to prepare an amended abstract of judgment reflecting 1,272 days of custody credit and to forward a copy of the abstract to

the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.